

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221352.2

DATE: July 9, 1986

MATTER OF: Trend Western Technical Corporation--
Request for Reconsideration

DIGEST:

1. Prior decision upholding contracting agency determination to exclude six staff positions from Office of Management and Budget Circular A-76 cost comparison is affirmed where the protester has not demonstrated that the agency acted improperly or in bad faith in finding that the six employees will perform governmental functions and will be retained to perform the functions whether the commercial activity under study is performed by government employees or contracted out.
2. Argument first presented by protester in request for reconsideration will not be considered where the protester knew the basis for the argument no later than the date of its comments on the agency report responding to the initial protest, more than 3 months prior to the request for reconsideration. GAO's Bid Protest Regulations, 4 C.F.R. part 21 (1986), do not permit the piecemeal presentation of information or arguments and parties that fail to submit all relevant information for our initial presentation do so at their own peril.
3. Office of Management and Budget Circular A-76 cost comparison guidelines concerning the number of contract administrators whose cost is to be included in the cost of contract performance must be interpreted in light of the general requirement that cost comparison studies consider all significant costs both for government and contract performance.

Trend Western Technical Corporation (Trend Western) requests reconsideration of our decision in Trend Western Technical Corporation, B-221352, May 6, 1986, 86-1 C.P.D. ¶ 437, wherein we denied its protest against the determination made by the Department of the Navy (Navy) pursuant to

Office of Management and Budget (OMB) Circular A-76 that the United States Marine Corps could provide base operating support at the Marine Corps Recruit Depot (MCRD) in San Diego, California, at a lower cost than Trend Western. The facts and legal arguments were set forth in detail in our original decision and will not be restated here, except where necessary to resolve this request for reconsideration.

We deny Trend Western's request for reconsideration.

Although in our prior decision we rejected Trend Western's claim of error as to several elements of the cost comparison, we agreed with the contentions of the protester and the agency that other aspects of the cost comparison were in error. Nevertheless, since the net effect of correcting the errors would only be to reduce the cost advantage of in-house performance to \$400,848, we denied Trend Western's protest against the determination that MCRD personnel could provide base operating support at a lower cost than Trend Western. Our decision did not consider the merits of Trend Western's arguments concerning the omission of certain partial man-years from the in-house cost estimate since, even if we were to resolve this issue in favor of the protester, this would reduce the advantage of in-house performance by no more than an additional \$63,592.

In its request for reconsideration, Trend Western challenges our decision as it relates to the exclusion of certain staff positions from the cost comparison and to the calculation of one-time conversion costs and contract administration costs.

EXCLUDED STAFF POSITIONS

In its initial protest, Trend Western challenged the agency's determination to exclude six staff positions (the facilities maintenance officer, assistant maintenance officer, operations officer, budget analyst, budget assistant, and secretary) from the cost comparison on the basis that the work performed by those staff members involves governmental-in-nature (GIN) functions related to the determination of work to be performed and budgeting for it. The effect of this alleged improper omission of staff positions was to reduce the cost of in-house performance by \$1,129,860.

In our prior decision, we noted that paragraph 7 of OMB Circular A-76, as revised Aug. 4, 1983, specifically

excludes governmental functions from its coverage. Such functions, which are so intimately related to the public interest as to mandate performance by government employees, include activities which require either the exercise of discretion in applying government authority or the use of value judgments in making decisions for the government. We recognized that the projection by an agency of personnel changes resulting from a conversion is largely a judgmental matter. World Maintenance Services Inc., B-217536, May 14, 1985, 85-1 C.P.D. ¶ 540; Mercury Consolidated, Inc., 63 Comp. Gen. 411 (1984), 84-1 C.P.D. ¶ 612. We also indicated that the determination by an agency of the size of a GIN residual staff and the number of employees required to generally accomplish the performance work statement (PWS) is largely a management decision involving judgmental matters that are inappropriate for our review. Furthermore, we stated our view that the agency should be free to make its own management decisions on staffing levels so long as they are not made fraudulently or in bad faith and so long as the subsequent cost comparison is done in accordance with the established procedures. Dwain Fletcher Co., B-219580, Sept. 27, 1985, 85-2 C.P.D. ¶ 348.

We concluded that Trend Western had not shown that the agency acted improperly or in bad faith in determining that the six staff positions are responsible for performing GIN functions and that the remaining staff positions included in the in-house cost estimate are sufficient to perform the work required under the PWS.

In its request for reconsideration, Trend Western concedes the "agency's right to withhold governmental functions from the commercial activity under study" and acknowledges that "the six employees in question may in fact perform some governmental functions." Although Trend Western continues to maintain that the six employees are needed to perform work included in the PWS, it believes that whether they are in fact needed for such work is beside the point. Rather, according to Trend Western, the "point of the issue is that the six personnel are in the MEO [most efficient organization] with PWS duties specified in the MEO" and, therefore, they must be included in the in-house cost estimate.

We do not agree with Trend Western that merely because the six staff positions were included in the MEO study's organizational chart, the labor costs associated with those positions had to be charged to the cost of having government

employees do the work in-house. As we pointed out in our initial decision, although the six employees are included in the proposed table of organization for the Maintenance Branch, the MEO study specifically indicates, and the Navy confirms, that they will be performing GIN functions. We also noted that the Navy specifically denies that the six employees will be performing work included in the PWS. Trend Western did not then and has not now demonstrated otherwise. Accordingly, Trend Western has provided our Office with no additional information or arguments to show that our earlier decision was factually or legally erroneous. See 4 C.F.R. § 21.12(a) (1986).

Cost of Material and Labor

The execution of job orders approved under the contract normally will be delayed pending receipt of any material required to complete the job and the scheduling of the job. Thus, at the end of each performance period (the contract is for 1 base year and 4 option years) there will remain unexecuted job orders for which approval has been received and the material has been ordered.

The solicitation provides that the material necessary to accomplish the tasks designated in the PWS, but not listed therein as furnished by the government, must be provided by the contractor. The solicitation, however, indicates that at the start of the first contract year the government will provide to the contractor at no cost to the contractor the material necessary to complete previously approved job orders awaiting scheduling. Further, the solicitation warns offerors not to include in their offers the cost of the labor required to complete the previously approved job orders since the contractor will be paid additional money outside the contract for such costs. The solicitation also requires the contractor to complete within the time specified on the job order any job order issued during the effective period of the contract but not completed within that time.

In our prior decision, we found no basis upon which to question the agency's decision to charge the cost of the labor to complete the job orders previously approved but not yet executed at the start of the contract as a cost of contracting out but not as a cost of in-house performance. The Navy indicated that its MEO, based on the normal workload for the maintenance function, already includes the

labor cost to perform the job orders previously approved but not yet executed at the beginning of the contract and that there will be no additional labor cost to the government for these job orders. Furthermore, the Naval Audit Service had certified that all staff positions which would perform the work required by the PWS were fully costed in the government's in-house cost estimate and the agency appeals board which initially considered Trend Western's appeal determined that the work required under the PWS could be accomplished by the personnel costed in the in-house cost estimate. On the other hand, if the Navy contracts out the maintenance function, then the government will be required to pay the contractor approximately \$188,730 over and above the contract price as payment for the additional labor. Accordingly, we were unable to conclude that the Navy lacked a reasonable basis for determining that a conversion to contract performance will result in an additional, one-time conversion cost to the government of approximately \$188,730.

In its request for reconsideration, Trend Western argues that the fact that the contractor "is required by the PWS to complete all job orders outstanding at the end of the contract . . . offsets the fact that the MCRD [Marine Corps Recruit Depot] would provide all necessary labor and materials, at no cost to the contractor, to execute all work orders outstanding at the start of the contract."

We point out, however, that while the PWS provides that the contractor shall complete any job orders issued during the contract but not executed within that time, the Supplement to OMB Circular A-76, part IV, ch. 2, section "D," subsection 1, requires that the personnel costs for accomplishing the requirements specified in the PWS be included in the in-house personnel cost estimate.

To the extent that Trend Western is now suggesting that the in-house cost estimate fails to include the cost of labor required to perform the job orders approved during the last performance period of the contract but not yet executed at the end of the contract, i.e., that the in-house cost estimate does not include the cost of labor included in Trend Western's bid as work required of the contractor under the PWS and thus is defective, this newly presented argument is untimely and we will not consider it. Although Trend Western knew of MCRD's position concerning the \$188,730 conversion cost no later than when it filed its February 19, 1986, comments on the report responding to its initial

protest, it did not raise this argument in rebuttal until it filed its request for reconsideration on May 27, more than 3 months later. Our regulations, however, do not permit the piecemeal presentation of information or arguments to our Office and we have held that parties that fail to submit all relevant information for our initial consideration do so at their own peril. See Swan Industries--Request for Reconsideration, B-218484.2, B-218485.2, May 17, 1985, 85-1 C.P.D. ¶ 569.

To the extent that Trend Western is arguing that the in-house cost estimate does not in fact already include the cost of labor to perform job orders not yet completed at the beginning of the contract, Trend Western has provided no evidence to refute the Navy's contrary assertion. Accordingly, we have no basis to conclude that our prior decision was factually or legally in error.

CONTRACT ADMINISTRATION COSTS

In its initial protest, Trend Western contended that the Navy improperly added the cost of eight contract administrators to Trend Western's proposal in spite of the fact that the Supplement to OMB Circular A-76, part IV, ch. 3, table 3-1, provides that only four contract administrators are to be used on a contract with this size staff for cost comparison purposes. Trend Western initially raised this issue with the administrative appeals board and the board concluded that the number of contract administrators to be charged to Trend Western's proposal should be reduced to six.

The record shows that MCRD applied to the proper agency authority (the Commandant of the Marine Corps) for a waiver of the four-contract-administrator limit. Because the Western Division of the Naval Facilities Engineering Command--the usual Navy administrators for this type of contract--is not located near MCRD and, therefore, Navy Public Works Center personnel would administer the offsite contract functions in conjunction with MCRD personnel who would administer the onsite contract functions, a waiver was granted. Essentially, MCRD, the Commandant of the Marine Corps, and the administrative appeals board all agreed that this particular contract would require more than four administrators because the contract requirement encompassed both onsite and offsite administration.

In these circumstances, we held that the protester's mere disagreement with contracting officials over the number


of administrators necessary to assure that the contract would be faithfully executed provided no basis for our Office to overturn the appeals board's finding that the waiver was at least in part valid.

In its request for reconsideration, Trend Western indicates that "[w]e do not contest the number of contract administrators that the Navy may want or need to assure the faithful performance of the contract, and do not object to the Public Works Center performing off-site administration." Instead, Trend Western argues that the waiver of the four-contract-administrator limit was improper because, according to Trend Western, the function under study is the real property maintenance activity at MCRD and that function is neither technically specific nor geographically dispersed. In other words, Trend Western contends that the function under study does not include the offsite contract administrators at the Public Works Center.

The Supplement to OMB Circular A-76, part IV, ch. 3, section "C," recognizes that the actual number of administrators necessary for a particular contract may vary and, therefore, provides a mechanism by which the table 3-1 limit may be waived. We believe that the cost comparison guidelines in this regard must be interpreted in light of the general requirement that cost comparison studies "consider all significant costs both for Government and contract performance." Supplement, part IV, ch. 2, section "A," subsection 1.

Accordingly, we conclude that the "function under study" can reasonably be viewed as including those contract administrators required to assure that the contract will be faithfully executed. A contrary interpretation would result in the exclusion from the cost comparison of a significant cost of contract performance, the cost of offsite contract administrators. Since Trend Western challenges neither the necessity for the additional contract administrators nor the appropriateness of using offsite contract administrators, we still see no basis for our Office to overturn the appeals board's finding that the waiver was at least in part valid.

The request for reconsideration is denied.


Harry R. Van Cleve
General Counsel